HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.224 of 1995

DIVISION BENCH:

Coram: HON'BLE MR.T.P.SHARMA &
HON'BLE MR.R.L.JHANWAR, JJ.

Kusem

Versus

State of M.P. (Now C.G.)

JUDGMENT FOR CONSIDERATION

Sd/-
T.P. Sharma
Judge

Hon'ble Mr.R.L.Jhanwar, J.

Sd/-
R.L. Jhanwar
Judge

Post for Judgment on : 27/4/2010

Sd/-
T.P. Sharma
Judge

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Coram: HON'BLE MR.**T.P.SHARMA &**
HON'BLE MR.**R.L.JHANWAR**, JJ.

APPELLANT — Kusem S/o Shri Santram Aghariya, Aged 22 years, R/o Barpati, P.S. Kartala Distt.Bilaspur, M.P. (now C.G.)

Versus

RESPONDENT — State of M.P. (Now C.G.) through the P.S. Katghora, Distt.Bilaspur.

(CRMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE, 1973)

Present:-

Mr.Alok Bakshi, counsel for the appellant.

Mr.Rakesh Kumar Jha, Dy.Govt. Advocate for the State/respondent.

JUDGMENT

(Delivered on 27th April, 2010)

The judgment of the Court was delivered by **T.P.Sharma, J.**:-

1. Challenge in this appeal is to the judgment of conviction & order of sentence dated 31.12.1994 passed by the 7th Additional Sessions Judge, Bilaspur in Sessions Trial No.73/93, whereby & whereunder learned 7th Additional Sessions Judge after holding the appellant guilty for the commission of culpable homicide amounting to murder of Kartik Bai convicted under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life.

2. Conviction is impugned on the ground that without there being any credible, clinching and legal evidence, the Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

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3. Case of the prosecution, in brief, is that in the intervening night of 10/11.11.1992, the appellant, neighbour of Kartik Bai (since deceased), went to the house of Kartik Bai in the absence of her husband, her daughter Gouribai (PW-4) aged about 17 years was present along with Kartik Bai. The appellant demanded liquor and consumed liquor along with Kartik Bai, then he requested that he will sleep in the house of Kartik Bai, Kartik Bai arranged two beds in her verandah. Deceased Kartik Bai and the appellant went for sleep in the beds at night. Gouribai (PW-4) also went for sleep inside the room. Second day morning when she woke up, she did not find her mother and the appellant in verandah, then she searched her mother, she went to the house of the appellant which was closed from outside but not locked. She asked and finally she opened the door where dead body of Kartik Bai was lying inside the room. She shouted and villagers gathered. Husband of the deceased was not present in the village, he was called, he came and finally he went to the police station and lodged merg intimation vide Ex.P/10A. Investigating officer proceeded for the scene of occurrence and after summoning the witnesses, inquest over dead body of deceased Kartik Bai was prepared vide Ex.P/4. Dead body was sent for autopsy to Assistant Surgeon, Primary Heath Centre, Podi Uproda. Dr.C.P.Singh (PW-9) conducted autopsy vide Ex.P/15 and found following injuries over the body of the deceased,

i) Tongue was protruded between teeth, froth was coming from the nostril,

ii) One abrasion on the right side of the neck,

iii) One contusion on the right side of the neck,

iv) Vagina discharge was prepared,

v) Trachea and other internal part of the body were congested,

vi) Alcoholic smell was present in the abdomen,

Cause of death was asphyxia as a result of throttling. Sealed clothes of the deceased and viscera were seized vide Ex.P/3. Spot map was prepared by investigating officer vide Ex.P/5. Underwear was seized from the accused vide Ex.P/6. Hairs of deceased Kartik Bai were seized from her daughter

Gouribai vide Ex.P/7. Froth was seized vide Ex.P/8. Broken piece of bottle, broken pieces of bangles and broken pieces of hairs were seized from the house of the appellant vide Ex.P/9. Finally F.I.R. was lodged vide Ex.P/12 & P/12A. The accused was also sent for medical examination where he found capable for committing intercourse vide Ex.P/13.

4. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') and after completion of investigation, charge sheet was filed before the Judicial Magistrate First Class, Katghora, who in turn committed the case in the Court of then Sessions, Bilaspur, from where 7th Additional Sessions Judge, Bilaspur received the case on transfer for trial.

5. In order to prove the guilt of the accused/appellant, the prosecution has examined as many as 13 witnesses. The accused/appellant was examined under Section 313 of the Code where he denied the circumstances appearing against him and claimed innocence and false implication in the crime in question. The appellant has taken specific defence that husband of the deceased was having suspicion on the character of his wife and also having doubt that his wife was having illicit relation with the appellant. On the date of incident he frightened and fled from the village. He has examined defence witness Krupal Singh (DW-1), uncle of the appellant who has deposed that husband of the deceased was having suspicion upon his wife and was suspecting that his wife and the appellant were having illicit relation. Husband of the deceased Bihanu, watchman was residing in the quarter, he was also having quarter in the same locality and the appellant was residing at the time of incident in his quarter.

6. After providing opportunity of hearing to the parties, learned 7th Additional Sessions Judge convicted and sentenced the appellant as aforementioned.

7. We have heard learned counsel for the parties, perused the judgment impugned and record of the Court below.

8. Learned counsel for the appellants vehemently argued that in the present case, the conviction is substantially based on last seen theory and in case of conviction based on last seen theory, last seen theory alone is not sufficient for conviction of the appellant in the absence of other corroborative evidence. In case of last seen theory, time gap between the deceased seen in the company of the appellant last time and recovery of dead body should be so small to exclude the possibility of third person between the deceased and the appellant. In case of conviction based on circumstantial evidence, the prosecution is required to prove complete chain of circumstances sufficient for drawing definite guilt of the appellant and exclude the possibility of innocence and guilt of any other persons, but in the present case, the conviction is substantially based on the solitary evidence of Gouribai (PW-4), daughter of the deceased which does not inspire confidence and trustworthy. Her evidence is not safe to rely even for the purpose of last seen theory. Story of the prosecution, in the present case, is improbable, impossible and unnatural. Initially, the case of the prosecution was that the appellant has committed rape/intercourse with the deceased and committed her murder, but the evidence of the prosecution clearly shows that at that time she was under menstrual period, she was using cloth in her private part, therefore, there was no possibility of commission of rape/intercourse. No man of prudence will take the person inside his room for commission of murder and leave dead body in his house that too without any motive for commission of such offence. These circumstances are sufficient for creating serious doubt upon the story of the prosecution.

9. Learned counsel placed reliance in the matter of **Bodhraj alias Bodha and others v. State of Jammu and Kashmir**[1] in which the Apex Court has held that conviction can be based solely on circumstantial evidence. However, it should be tested by the touchstone of law relating to circumstantial evidence.

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[1](2002) 8 SCC 45

10. On the other hand, learned State counsel supported the judgment impugned and argued that definitely in case of conviction based on circumstantial evidence or last seen theory, the prosecution is required to prove complete chain of circumstances and it must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the present case, the prosecution has examined Gouribai (PW-4), 17 years aged daughter of the deceased who was present in her house when the appellant came to her house, demanded liquor and consumed liquor with her mother. She has specifically deposed in her evidence that her mother and the accused were sleeping in verandah at night and on the second day morning dead body of her mother was found inside the room of the appellant. In the present case, time gap between the deceased seen alive in the company of the appellant and recovery of dead body was so small and is sufficient to exclude the possibility of third person between the accused and the deceased. The appellant was under obligation to explain that when he parted the company of the deceased, who took the deceased in the house of the appellant, who has caused injuries to the deceased and how she died. Non-explanation of the aforesaid circumstances is strong adverse against the appellant. These circumstances are sufficient for conviction of the accused.

11. In order to appreciate the arguments advanced on behalf of the parties, we have examined the material available on record. In the present case, homicidal death as a result of ante-mortem injuries of deceased Kartik Bai has not been substantially disputed by the appellant, on the other hand, otherwise also established by the evidence of Dr.C.P.Singh (PW-9) and autopsy report Ex.P/15 which reveals that deceased died as a result of throttling and death was homicidal in nature.

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12. As regards the complicity of the accused/appellant in the crime in question, the conviction is substantially based on the evidence of Gouribai (PW-4), daughter of the deceased who has deposed in her evidence that on the date of incident at night she and deceased Kartik Bai (her mother) were present in their house, they took meal at night, at that time, accused came and demanded meal from her mother by asking her didi (sister). When she provided meal to the accused, the accused was having liquor and then he and her mother consumed liquor, the appellant requested for sleep in her house, then her mother arranged two beds in verandah where her mother and the accused went for sleep. She (Gouribai) went for sleep in her room. At about 7 p.m. when she woke up, her mother was not present, she searched her mother. Room of the appellant was closed from outside, she called her mother and finally she opened the door of the accused, her mother was lying inside the room and she was dead, then she shouted.

13. In the present case, Bihanu (PW-5) husband of deceased Kartik Bai has deposed in his evidence that on the date of incident he was at village Manchdoli, he was informed by the persons then he came to village. Dead body of his wife was lying in the room of the accused, then he went to the police station and lodged the report. Defence has cross-examined this witness at length, but he has denied the suggestion that on the ground that his wife was sleeping with the appellant he assaulted her, then his wife went to the house of the appellant, he also chased her and killed his wife in the house of the appellant and fled from the spot. Defence has cross-examined Gouribai (PW-4) in detail, but she has categorically deposed in her cross-examination that between 10 to 11 p.m. the appellant came to his house and demanded meal and after taking meal and consuming liquor they went for sleep. Defence has cross-examined this witness at length, but has not been able to elicit anything in her cross-examination to discredit her testimony. Her evidence is sufficient for drawing inference that in the intervening night of 10/11.11.1992 between 10 to 11 p.m. the appellant came to the house of the deceased, he demanded meal, he took meal and after taking meal, he

consumed liquor with the deceased and then they went for sleep in verandah and on the second day morning, the deceased was not found in her house and her dead body was found in the house of the appellant. The appellant has not offered any explanation that when he parted the company of the deceased and how dead body was found in his house.

14. As held by the Apex Court in the matter of **Bodhraj alias Bodha and others (supra),** conviction can be based solely on circumstantial evidence. However, it should be tested by the touchstone of law relating to circumstantial evidence. Paras 9, 15, 16 & 17 reads as under:-

> "**9.** Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen it commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.
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> **15.** There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.
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> **16.** In **Hanumant Govind Nargundkar v. State of M.P**[2] it was observed thus :
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> > "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion

[2] AIR 1952 SC 343 : 1953 Cri LJ 129

consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

17. A reference may be made to a later decision in **Sharad Birdichand Sarda v. State of Maharashtra**[3]. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

2) the fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3) the circumstances should be of a conclusive nature and tendency;

4) they should exclude every possible hypothesis except the one to be proved; and

5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

15. While dealing with the question of conviction based on last seen theory, the Apex Court in the matter of **State of Goa v. Sanjay Thakran and another and another connected appeal**[4] has held that in case of last seen together the proof of last seen together would be relevant if the prosecution establishes that in the intervening period there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime. Para 34 of the said judgment reads thus:-

"34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken

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[3](1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622
[4](2007) 3 SCC 755

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into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

16. While dealing with the same question, the Apex Court in the case of **Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai**[5] has held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter, then it would be obligatory on the

[5](2003) 1 SCC 534

accused to explain the circumstances in which the missing person and the accused parted company. Para 19 of the said judgment reads thus:-

> "19. The last circumstance relied on by the courts below pertains to the stand taken by the appellants in the trial as to parting company with Vadivelu. Here we must notice that as discussed hereinabove, the prosecution has established the fact that Vadivelu was seen in the company of the appellants from the morning of 5.3.1985 till at least 5 p.m. on the same day, when he was brought to his house and thereafter his dead body was found in the morning of 6.3.1985. Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Cr.P.C. they have not taken any specific stand whatsoever. In the evidence of PW-25, it is elicited that on 5.3.1985 in the afternoon when Vadivelu was produced before the said witness, he after interrogation allowed Vadivelu to go, but then it is found from his evidence that he instructed A-1 to keep a watch over Vadivelu. In such circumstances, it was incumbent upon A-1 to have explained to the court in what circumstances they parted company. He has not given any explanation in this regard. On the contrary, the prosecution has established the fact that on the very day at about 5 p.m., Vadivelu was brought to the house of PW-1 by the appellants which was seen by PW-5. This part of the evidence of PW-5 has gone unchallenged in the cross-examination and, therefore, we will have to proceed on the basis that, what is stated by PW-5 in this regard is true. If that be so, the prosecution has established the fact that on 5.3.1985 at 5 p.m. Vadivelu was still in the company of these appellants and, therefore, in the absence of any specific explanation from the appellants in this regard, and in view of the other incriminating circumstances against the appellants having been proved by the prosecution, an adverse inference will have to be drawn against these appellants as to their part in the missing of Vadivelu. At this point, it may be relevant to note that though no specific stand has been taken by the appellants as to their parting company with Vadivelu, in their statement under Section 313 Cr.P.C., it is seen from the evidence of PWs.1 and 5 that A-1 told the said witnesses on the night intervening between 5-3-1985 and 6-3-1985 that Vadivelu had escaped from the Police Station when he was allowed to sleep in the verandah of the

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Police Station. This explanation given by A-1 to PW-1 which was also heard by PWs.5 and 14, clearly shows that the same is totally false and obviously was an excuse made by the appellants to conceal the true facts and, therefore, this circumstance of A-1 making a false statement to PW-1 can also be taken as a circumstance against the appellants, in establishing the appellants' guilt. This Court in more than one case has held, that if the prosecution, based on reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. See Joseph v. State of Kerala [2000 5 SCC 197]. Therefore, we are in agreement with the finding of the courts below that circumstance No.7 also stands established against the appellants."

17. In the present case, evidences of Gouribai (PW-4), Bihanu (PW-5), Dr.C.P.Singh (PW-9) are sufficient to establish the following circumstances;

i) In the intervening night of 10/11.11.1992, Bihanu (PW-5) was not present in his house;

ii) The appellant came between 10 to 11 p.m. in the house of the deceased Kartik Bai and after taking meal and consuming liquor, he went for sleep in verandah of deceased Kartik Bai in the same verandah;

iii) On the second day morning, Kartik Bai and the appellant were not found in verandah/house of the deceased;

iv) Dead body of Kartik Bai was found inside the room occupied by the appellant;

v) The appellant has not offered any explanation that how dead body of Kartik Bai was found inside his room'

vi) The appellant was not present in the village;

vii) The appellant has not offered any explanation that when he parted the company of Kartik Bai

viii) The appellant has not offered any explanation that who has caused death of deceased Kartik Bai.

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18. If the aforesaid circumstances are considered together then only hypothesis would be possible that the appellant is the person who has caused culpable homicide amounting to murder of Kartik Bai and except the appellant none else has committed the offence and exclude the possibility of third person.

19. After appreciating the evidence available on record, learned 7th Additional Sessions Judge has convicted and sentenced the appellant as aforementioned.

20. On close scrutiny of the evidence, we do not find any illegality or infirmity in the judgment impugned warranting any interference. The appeal being devoid of merit is liable to be dismissed and it is hereby dismissed. The appellant is on bail, he shall surrender himself forthwith before the 7th Additional Sessions Judge, Bilaspur for serving remaining part of sentence passed in Sessions Trial No.73/93.

Sd/-
T.P. Sharma
Judge

Sd/-
R.L. Jhanwar
Judge

B/-